

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs November 14, 2007

**DARYL FORTNER v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County**  
**No. 3838     Monte Watkins, Judge**

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**No. M2007-01408-CCA-R3-PC - Filed April 24, 2008**

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Following a late-night attack on his former wife and step-son, Petitioner, Daryl Fortner, was convicted by a Davidson County jury of two counts of attempted first degree murder and one count of aggravated burglary. The trial court sentenced Petitioner to two twenty-year sentences to be served consecutively to each other, and a five-year sentence to be served concurrently with the two twenty-year sentences. Petitioner's sentences resulted in an effective sentence of forty years. Petitioner's convictions and sentences were affirmed on direct appeal. Petitioner subsequently filed a petition for writ of habeas corpus alleging that the trial court acted illegally and was without authority to sentence him to consecutive sentences. The habeas corpus court summarily dismissed the petition. After a thorough review of the record, we have determined that the trial court had authority to impose consecutive sentences and did not act illegally in doing so. Therefore, we affirm the dismissal of the petition by the habeas corpus court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES, and JOHN EVERETT WILLIAMS, JJ., joined.

Daryl Fortner, Pro Se, Nashville, Tennessee.

Robert E. Cooper, Jr., Attorney General & Reporter; Leslie E. Price, Assistant Attorney General; Victor S. Johnson, District Attorney General, and Roger Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### Factual Background

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This Court stated the following facts on direct appeal:

The defendant, Daryl Fortner, and one of the victims, Tina Fortner, were married in August 1999. Soon after they married, the couple began having problems. The couple purchased a mobile home and lived together in Joelton, Tennessee. In January 2000, Mrs. Fortner's adult son, Cory Edwards, moved in with the couple. The marital problems continued, and Mrs. Fortner obtained an order of protection against the defendant in June or July 2000. The mobile home was moved to Clarksville, Tennessee where the defendant again moved in with his wife and her son. However, the couple's problems continued. The defendant moved out again, and in October 2000, he made threats that he was going to "get" Mrs. Fortner and her son and was "going to burn [their] trailer to the ground."

Late one night in November 2000, a loud noise awakened Mrs. Fortner while she and her son were asleep in the mobile home. She walked into the kitchen area of the mobile home and noticed that the glass on the back door was cracked. Suddenly, a piece of concrete crashed through the glass of the back door. The defendant reached through the broken glass, unlocked the door, and came inside. As the victim yelled for her son, the defendant placed a full can of gasoline down on the floor in the utility room. He then shoved Mrs. Fortner into her bedroom and pushed her down on the bed. The defendant turned off the bedroom light. Mrs. Fortner immediately got up from the bed to turn on the nightstand light. As she arose from the bed, she heard a gunshot and saw a flash of light. Upon turning on the light, she saw the defendant standing near the foot of the bed with a gun still pointing toward the pillow where her head had been seconds earlier. The bullet fired from the gun went into the pillow where the victim had been lying.

After hearing the commotion in the other room, Edwards came down the hall to his mother's bedroom. The defendant pointed the gun at Edwards and ordered him into the bedroom. As all three of them were in the bedroom, the defendant began telling them that he was going to kill them. At some point, the defendant dropped a glove on the floor that he had apparently brought to the scene. While the defendant and Mrs. Fortner were discussing the situation, she told the defendant that she wanted a cigarette. The defendant told Edwards to go into the other room and bring back a cigarette for his mother. Edwards complied, during which time the defendant was still pointing the gun at them and telling them that he was going to kill them. The trio soon managed to move into the living room. The defendant pushed Edwards

down into a chair, pulled out a package containing fifty feet of nylon rope, and told Mrs. Fortner to tie up her son. She refused and went toward the front door. The defendant grabbed her from behind and hit her in the head with the gun. Edwards lunged from the chair and grabbed the defendant. The two men began wrestling on the floor of the living room. As the struggle continued, Edwards told his mother to go for help. Mrs. Fortner ran outside and began calling for help. While the defendant and Edwards were wrestling for control of the gun, a shot was fired striking Edwards in the arm. The defendant then left the mobile home and drove away.

*State v. Daryl Eugene Fortner*, No. M2003-00950-CCA-R3-CD, 2004 WL 1434476, at \*1-2 (Tenn. Crim. App., at Nashville, June 25, 2004). At the conclusion of a jury trial, Petitioner was convicted of two counts of attempted first degree murder and one count of aggravated burglary. *Id.* at \*3. The trial court sentenced Petitioner to twenty years for each attempted first degree murder conviction to be served consecutively to each other and five years for the aggravated burglary conviction to be served concurrently with the consecutive twenty-year sentences. *Id.* On June 25, 2004, this Court affirmed the convictions and sentences on direct appeal. *Id.* at \*1.

On March 15, 2007, Petitioner filed a petition for writ of habeas corpus.<sup>1</sup> Petitioner argued the following issues: (1) his sentence was in direct contravention to the sentencing statute and therefore void and illegal; (2) the trial court erred in using the firearm as an enhancement for consecutive sentencing; (3) the trial court abused its authority in ordering consecutive sentencing; (4) a new rule of constitutional law was made retroactive and was previously unavailable; and (5) “sentence[ ] imposed, seriously affects the fairness, integrity or public reputation of the judicial proceedings under “plain error” of misapplication of sentencing statutes.” The State filed a motion to dismiss on April 16, 2007. On the same date, the habeas corpus court filed an order summarily dismissing the writ of habeas corpus because Petitioner did not establish that his judgment was void or that he was illegally confined.

### ANALYSIS

The determination of whether to grant habeas corpus relief is a question of law. *See Hickman v. State*, 153 S.W.3d 16, 19 (Tenn. 2004). As such, we will review the habeas corpus court’s findings de novo without a presumption of correctness. *Id.* Moreover, it is a petitioner’s burden to demonstrate, by a preponderance of the evidence, “that the sentence is void or that the confinement is illegal.” *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000).

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<sup>1</sup> Petitioner attached a copy of a petition for post-conviction relief as an exhibit to his writ of habeas corpus petition. However, this petition is not stamped as filed. Therefore, we are unable to ascertain whether the petition for post-conviction relief was filed and ruled upon by the trial court.

Article I, section 15 of the Tennessee Constitution guarantees an accused the right to seek habeas corpus relief. *See Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). A writ of habeas corpus is available only when it appears on the face of the judgment or the record that the convicting court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). In other words, habeas corpus relief may be sought only when the judgment is void, not merely voidable. *See Taylor*, 995 S.W.2d at 83. “A void judgment ‘is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant’s sentence has expired.’ We have recognized that a sentence imposed in direct contravention of a statute, for example, is void and illegal.” *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000) (quoting *Taylor*, 955 S.W.2d at 83).

However, if after a review of the habeas petitioner’s filings, the habeas corpus court determines that the petitioner would not be entitled to relief, then the petition may be summarily dismissed. T.C.A. § 29-21-109; *State ex rel. Byrd v. Bomar*, 381 S.W.2d 280 (Tenn. 1964). Further, a habeas corpus court may summarily dismiss a petition for writ of habeas corpus without the appointment of a lawyer and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. *Passarella v. State*, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994), *superceded by statute as stated in State v. Steven S. Newman*, No. 02C01-9707-CC-00266, 1998 WL 104492, at \*1 n.2 (Tenn. Crim. App., at Jackson, Mar. 11, 1998).

The procedural requirements for habeas corpus relief are mandatory and must be scrupulously followed. *Summers v State*, 212 S.W.3d 251, 260 (Tenn. 2007); *Hickman*, 153 S.W.3d at 19-20; *Archer*, 851 S.W.2d at 165. For the benefit of individuals such as Petitioner, our legislature has explicitly laid out the formal requirements for a petition for a writ of habeas corpus at Tennessee Code Annotated section 29-21-107:

(a) Application for the writ shall be made by petition, signed either by the party for whose benefit it is intended, or some person on the petitioner’s behalf, and verified by affidavit.

(b) The petition shall state:

(1) That the person in whose behalf the writ is sought, is illegally restrained of liberty, and the person by whom and place where restrained, mentioning the name of such person, if known, and, if unknown, describing the person with as much particularity as practicable;

(2) The cause or pretense of such restraint according to the best information of the applicant, and if it be by virtue of any legal process, a copy thereof shall be annexed, or a satisfactory reason given for its absence;

(3) That the legality of the restraint has not already been adjudged upon a prior proceeding of the same character, to the best of the applicant's knowledge and belief; and

(4) That it is the first application for the writ, or, is a previous application has been made, a copy of the petition and proceedings thereon shall be produced, or satisfactory reasons be given for the failure so to do.

A habeas corpus court “properly may choose to summarily dismiss a petition for failing to comply with the statutory procedural requirements.” *Summers*, 212 S.W.3d at 260; *see also Hickman*, 153 S.W.3d at 21. Further, in *Summers*, our supreme court explained:

In the case of an illegal sentence claim based on facts not apparent from the face of the judgment, an adequate record for summary review must include pertinent documents to support those factual assertions. When such documents from the record of the underlying proceedings are not attached to the habeas corpus petition, a trial court may properly choose to dismiss the petition without the appointment of counsel and without a hearing.

212 S.W.3d at 261.

Three of the arguments in the petition for writ of habeas corpus herein concern the trial court's imposition of consecutive sentences. Petitioner's first argument is essentially that his criminal history did not support a finding that he was a dangerous offender and, therefore, the trial court lacked jurisdiction to order consecutive sentences and this “deviated from the provisions of the 1989 Act . . . .” Petitioner also argues that the trial court erred in using his use of a firearm during the commission of the offense to support the imposition of consecutive sentencing. Petitioner next argues that the trial court abused its authority in imposing consecutive sentencing. This Court has already determined that the record supported the imposition of consecutive sentences in Petitioner's direct appeal. *Daryl Eugene Fortner*, 2004 WL 1434476, at \*8. This Court found that the record supported the imposition of consecutive sentencing based upon the fact that Petitioner was a dangerous offender and that Petitioner was on probation at the time he committed the crime in this case. *Id.* at \*8-9. Thus, this issue has been previously determined, is the law of the case, and cannot be revisited on habeas corpus review. *See Morgan v. State*, 445 S.W.2d 477, 478 (Tenn. Crim. App. 1969).

In addition, this Court has determined that a petitioner's challenge to the imposition of consecutive sentences is not cognizable in a petition for writ of habeas corpus relief. *See Tommy Dixon v. State*, No. W2005-02921-CCA-R3-HC, 2006 WL 1491419, at \*2 (Tenn. Crim. App., at Jackson, May 31, 2006); *James Oliver Ross v. State*, No. W2003-00843-CCA-R3-HC, 2003 WL

23100816, at \*2 (Tenn. Crim. App., at Jackson, Dec. 31, 2006); *Alonzo Stewart v. State*, No. 03C01-9810-CR-00380, 1999 WL 521195, at \*1 (Tenn. Crim. App., at Jackson, Jul. 23, 1999), *perm. app. denied*, (Tenn. Nov. 9, 1999).

Petitioner's remaining two issues are that his judgments are void based upon his assertion that the trial court's imposition of consecutive sentences is illegal pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), and the subsequent line of cases. Courts in Tennessee have held that *Blakely* violations, in and of themselves, are constitutional violations, but do not render a judgment void. *See Timothy R. Bowles v. State*, No. M2006-01685-CCA-R3-HC, 2007 WL 1266594, at \*2 (Tenn. Crim. App., at Nashville, May 1, 2007); *James R. W. Reynolds v. State*, No. M2004-02254-CCA-R3-HC, 2005 WL 736715, at \*2 (Tenn. Crim. App., at Nashville, Mar. 31, 2005), *perm. app. denied*, (Tenn. Oct. 10, 2005); *Alfio Orlando Lewis v. Ricky Bell*, No. M2004-02735-CCA-R3-HC, 2005 WL 884998, at \*2 (Tenn. Crim. App., at Nashville, Apr. 14, 2005); *Earl David Crawford v. Ricky Bell*, No. M2004-02440-CCA-R3-HC, 2005 WL 354106, at \*1 (Tenn. Crim. App., at Nashville, Feb. 15, 2005), *perm. app. denied*, (Tenn. June 27, 2005). Because a *Blakely* violation renders a judgment merely voidable as opposed to void, it is not subject to attack through a writ for habeas corpus relief. *See Passarella*, 891 S.W.2d at 627.

In addition, courts in Tennessee have also held that *Blakely* does not apply retroactively to cases that have already been finalized on direct appeal and are on collateral appeal. *See Timothy R. Bowles*, 2007 WL 1266594, at \*3; *James R. W. Reynolds*, 2005 WL 736715, at \*2; *Donald Branch v. State*, No. W2003-03042-CCA-R3-PC, 2004 WL 2996894, at \*10 (Tenn. Crim. App., at Jackson, Dec. 21, 2004), *perm. app. denied*, (Tenn. May 23, 2005); *Carl Johnson v. State*, No. W2003-02760-CCA-R3-PC, 2005 WL 181699, at \*4 (Tenn. Crim. App., at Jackson, Jan. 25, 2005), *perm. app. denied*, (Tenn. June 27, 2005).

Therefore, Petitioner's issues are without merit.

### **CONCLUSION**

For the foregoing reasons, we affirm the decision of the habeas corpus court.

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JERRY L. SMITH, JUDGE